

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

TIMOTHY ECKERT,

Plaintiff,

04-CV-0538S(Sr)

v.

UNITED AUTOMOBILE WORKERS, et al.,

Defendants.

REPORT, RECOMMENDATION AND ORDER

This matter was referred to the undersigned by the Hon. William M. Skretny, in accordance with 28 U.S.C. § 636(b), for all pretrial matters, including hearing and disposition of all non-dispositive motions. Dkt. #53.

By Decision and Order entered June 12, 2006, this Court granted, in part, defendant's motion to compel discovery and directed plaintiff to comply with the Court's Decision and Order no later than June 30, 2006. Dkt. #134. The Court warned plaintiff that his failure to comply with the Decision and Order of the Court could result in sanctions pursuant to Fed. R. Civ. P. 37, including, but not limited to, the imposition of monetary sanctions, preclusion of evidence, or dismissal of his complaint. Dkt. #134. Notwithstanding this warning from the Court, and a letter dated August 7, 2006, from defendant reminding plaintiff of his obligation to provide discovery, defendant represents that it has not received any additional discovery from plaintiff. Dkt. #136, ¶ 4. As a result, defendant moves for, *inter alia*, dismissal of the Complaint in its entirety. Dkt. #136.

Although the Court Ordered plaintiff to respond to defendant's motion no later than October 13, 2006, no response has been received to date. Dkt. #137. The Court notes that there is no indication that plaintiff did not receive the Court's Decision and Order granting, in part, defendant's motion to compel discovery or the Court's Order directing a response to the defendant's motion, both of which were mailed to the address plaintiff provided the Court. Therefore, it is recommended that the Court exercise its discretion, pursuant to Fed. R. Civ. P. 41(b), to dismiss this action for failure to comply with a court order and failure to prosecute.

Accordingly, pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED, that this Report, Recommendation and Order be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report, Recommendation and Order must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statute, Fed.R.Civ.P. 72(b) and Local Rule 72.3(a)(3).

The district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but was not presented to the magistrate judge in the first instance. See, e.g., *Patterson-Leitch Co. v. Massachusetts Mun. Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed.2d 435 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Report, Recommendation and Order), may result in the District Judge's refusal to consider the objection.

The Clerk is hereby directed to send a copy of this Order and a copy of the Report and Recommendation to the plaintiff and counsel for the defendant.

SO ORDERED.

DATED: Buffalo, New York
October 30, 2006

S/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge